

### **REMARKS/ARGUMENTS**

In view of the amendments made to the claims, and in view of the following remarks, reconsideration of the application is respectfully requested.

On page 2 of the Office Action, the Examiner objected to claims 5, 8, 34, 37-39 and 50 because of informalities. By the present amendment, periods were added to claims 5, 34, 37, 38, and 50 as required by the Examiner. However, claim 39, although listed as one of the claims needing a period, was in proper form as originally filed and therefore has not been amended. In claim 8, the period after "glycerin" has been replaced by a comma. In addition to these identified changes, the application claims have been further reviewed for any other formalities and, accordingly, additional changes have been made to claims 1, 22, 25, 26, 28, 32, 39, 40, 42, 43, 46, 51-53, 56-58, 60, 61, 63, 66, 71, 72, 74, 75 and 81. More specifically, these claims have been amended to address potential idiomatic English, dependency and/or antecedent basis problems. Therefore, the Applicant has made an earnest attempt to aid the Examiner in presenting the claims in best form for allowance by making all of these changes which are not seen to alter the scope of the claims or to introduce any new matter into the application.

Presently, claims 1-81 stand as rejected based on prior art under 35 U.S.C 103(a). More specifically, the Examiner has rejected claims 1-81 as being unpatentable over Nayyar Patent No. 6,403,134 in view of Giffard U.S. Patent Application Publication 2005/0079244, in view of Rhodes Patent No. 6,780,445 and in further view of the prior art discussed on page 1 of the present application. As will be detailed more fully below, it is respectfully submitted that the prior art applied by the Examiner, when taken as a whole, does not disclose or suggest the present invention. In addition, one of ordinary skill in the art would not be motivated to make the modifications to the main reference as suggested by the Examiner. Furthermore, if the modification suggested by the Examiner were made, the teachings of the main reference would be destroyed.

Initially, when considering the patentability of the present invention, it should be recognized that the present invention as claimed in independent claims 1 and 40 is concerned with a food product infused with inulin having a degree of polymerization of about 2-9. Independent claims 65 and 73 are specifically directed to the combination of cereal and inulin infused dried fruit pieces. First of all, none of the references relied upon by the Examiner discloses an inulin degree of polymerization of 2-9. The Examiner recognizes this deficiency in connection with discussing the infused vegetables of the main Nayyar reference. Then the Examiner discusses the existence of other foods containing inulin in discussing the Giffard reference, which is concerned with adding inulin to animal food, and the Rhodes reference, which suggests adding inulin as a fat substitute in cheese. From there, the Examiner takes two enormous "obvious" leaps in stating that it would be obvious to modify the vegetables of Nayyar to have inulin and second that the combination would have the particular degree of polymerization claimed.

The new found benefits of infusing the food with inulin to the particular degree of polymerization specified is emphasized in the specification as originally filed. For instance, the Examiner's attention is drawn to paragraph 32 of the published application number 2005/0064082 wherein it is stated that "such low molecular weight inulin materials are selected herein due to their relative osmotic superiority compared to otherwise similar but to higher molecular weight inulin material. Due to their osmotic superiority, higher levels of inulin can be infused." See paragraph 32 in Application Publication 2005/0064082. Simply stated, there does not exist any teaching, either implicit or explicit, in the cited prior art which suggests utilizing an inulin having a degree of polymerization ranging from about 2-9, and the Examiner's statement that "Nothing is seen that the degree of polymerization is not contained in the above types of inulin" does not meet the burden for a case of *prima facie* obviousness for independent claims 1 and 40, or the claims dependent therefrom.

The main reference to Nayyar is directed to infusing vegetables with an antimicrobial which enables the vegetables to taste fresh after being frozen and subsequently cooked. Regardless of how the Examiner proposes to modify Nayyar, the

result must be an antimicrobial infused vegetable or else the reference is destroyed. As indicated above, independent claims 65 and 73 are specifically directed to the combination of cereal and inulin infused dried fruit pieces. With this limited amount of insight into the present invention and Nayyar, it should be readily apparent that Nayyar is not even remotely concerned with the present invention. Still, the Examiner is holding that one of ordinary skill in the art would look to modify Nayyar to be infused with inulin because Giffard suggests adding inulin to animal food and Rhodes suggests adding inulin as a fat substitute in cheese. Simply stated, no motivation exists in the prior art to make such a combination. However, even if one of ordinary skill in the art was to consider modifying the product in Nayyar to include inulin, the product would not possess the specified degree of polymerization as outlined above and would not be an inulin infused fruit as required by claims 65 and 73. In fact, none of the references relied upon by the Examiner is even concerned with dried fruit products. In all fairness, the Examiner attempts to address this claimed aspect by stating that Nayyar teaches infusing tomatoes with an antimicrobial and, according to the Examiner, a tomato is both a vegetable and a fruit. Respectfully, the perceived classification of a tomato by the Examiner should not be the decisive factor. The Nayyar patent itself **clearly** classifies tomatoes as vegetables in accordance with the claimed invention. See, for example, claims 6, 20, 32 and 35. Therefore, in accordance with the reference relied upon by the Examiner, a tomato is a vegetable. Furthermore, the Examiner still cannot get away from the fact that Nayyar is concerned with vegetables which are frozen and then cooked. It is simply inconceivable how can this arrangement could be reasonably relied upon in rejecting claims directed to cereal with inulin infused dried fruit.

In general, the Examiner has taken one reference teaching to infuse vegetables with an antimicrobial, modified it to be infused with inulin because two other references teach putting inulin in animal food and cheese, and then combines the resulting product with cereal, basically because cereal exists. When applying patents under 35 U.S.C 103(a), the prior art references must be considered as a whole and must suggest the desirability and thus the obviousness of making the combination. The initial burden is on the Examiner to provide some suggestion of the desirability of doing what the inventor has done and

that motivation must come from the applied references or the knowledge of one of ordinary skill in the art (MPEP 2141). When the motivation to combine the teachings of the references is not immediately apparent, it is the duty of the Examiner to explain why the combination of the teachings is proper (MPEP 2142). In the present case, the Applicant respectfully submits that the Examiner has combined references without the proper motivation or teachings from the references, but rather utilizing impermissible hindsight of the present invention. In addition, the Examiner has not found a single teaching of the particular degree of polymerization recited in many of the claims and has simply glossed over this specific limitation, while ignoring the emphasized advantages thereof, formulating the rejection presented. Based thereon, it is respectfully submitted that a proper *prima facie* case of obviousness has not been presented with respect to the independent claim subject matter and these rejections should be withdrawn.

It is also respectfully submitted that the dependent claims in the application even further distinguish the invention from the applied prior art. For instance, claims 41 and 45 are concerned with infusing with an inulin containing syrup. Rhodes, which is relied upon by the Examiner, describes mixing Inulin IQ with cellulose and water to produce a mixture with "the body and texture of butter" to be used for infusing cheese curd. See column 37, lines 51-62. Further, Rhodes does not teach an infusing step utilizing a ratio of inulin containing syrup to food pieces ranging from about 20:1 to about 1:1 as is required by claim 42; nor does Rhodes teach utilizing inulin, wherein at least a portion of the inulin is oligofructose as required by claim 43. Again, although Nayyar teaches infusing vegetables with an infusion including a sugar, Nayyar does not contain any reference to the use of inulin or inulin containing syrup, nor has the Examiner set forth any proper reasons for combining the teachings of Nayyar and Rhodes. With respect to claim 44, none of the cited prior art teaches admixing an inulin containing syrup with food pieces during the infusing step. At best, Nayyar teaches adding an "Inulin microcrystalline cellulose mixture" having "the body and texture of butter" to curd during an infusion process. See column 37, lines 51-62. No teaching, either implicit or explicit, in the cited prior art suggests allowing for osmotic equilibrium during an infusing step as

required by claims 45 and 48, and the Examiner's statement that "Nothing is seen in Nayyar et al. that equilibrium has not been reached" does not meet the burden for a case of *prima facie* obviousness. Many of the other claims set forth specific fruits employed in connection with the invention. With respect to this feature, it is submitted that the Examiner's statement that "there is no patentable distinction between fruits and vegetables" is clearly erroneous.

For at least claims 65-81, the Examiner's attention is also drawn to the current application wherein the benefits of adding inulin infused fruit to a cereal are described. Specifically, paragraph 16 of the 082' publication notes that "by adding the inulin as part of a blended component to cereal base rather than in the cereal base, the manufacturing problems associated with handling a high inulin level cooked cereal dough can be minimized". As also stated by Applicant in the specification, "Surprisingly, providing inulin infused dried fruit provides a convenient technique for providing high levels of fiber in an RTE cereal that minimizes the dough handling and hygroscopic problems of inulin addition to RTE cereals." See paragraph 16 of the 082' Publication. To this end, the present invention is quite distinct from the prior art disclosure from the present application which is being relied upon by the Examiner. None of the cited prior art, either alone or in combination, teaches the use of inulin bearing fruit pieces, let alone the admixing of fruit pieces having a high fiber content with a quantity of a ready-to-eat cereal or the resultant cereal having inulin infused fruit pieces admixed with cereal pieces.

Based on the comments presented above and the amendments to the claims, it is respectfully requested that the rejections be withdrawn, the claims be allowed and the application expeditiously passed to issue. Finally, the Applicant notes that the Examiner deleted U.S. Patent No. 4,361,587, as listed in the 1449 IDS form submitted in this case, as not being material to the patentability of the invention. To this end, the Applicant would concur. If the Examiner should have any further concerns regarding this application, she is cordially invited to contact the undersigned at the number provided below to expedite the prosecution.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Everett G. Diederiks, Jr.", written over a horizontal line.

Everett G. Diederiks, Jr.  
Attorney for Applicant  
Reg. No. 33,323

Date: November 15, 2005  
**DIEDERIKS & WHITELAW, PLC**  
12471 Dillingham Square, #301  
Woodbridge, VA 22192  
Tel: (703) 583-8300  
Fax: (703) 583-8301